Re Loh Kah Kheng (deceased)

HIGH COURT (PENANG) — INQUIRY NO 98-96-87
MOHAMED DZAIDDIN J
20 OCTOBER 1989

Evidence — Privilege — Condition precedent before privilege can apply — Written information given in official confidence — Evidence Act 1950, ss 124 & 162

Criminal Procedure — Inquiry — Duty of magistrate when holding inquiry — Criminal Procedure Code (FMS Cap 6), s 337

Criminal Procedure — Criminal revision — Object of

During the inquest into the death of one Loh Kah Kheng, the investigating officer informed the court that he had received information from an informer concerning the deceased's death, which related to the commission of a crime. As the information was given in official confidence, the police claimed privilege and the magistrate ruled that the written information could not be disclosed at the inquiry, but held that it should be shown to her.

Held, overruling the magistrate's ruling:

(1) The object of a revision is to satisfy the judge as to the correctness, legality, or propriety of any finding, sentence or order recorded or passed.

(2) Before privilege under s 124 of the Evidence Act 1950 can apply, the condition precedent that the information be communicated in official confidence must be satisfied. The court is the sole judge of this question, and in coming to its decision can not only inspect the document, but can also take other evidence to determine its admissibility.

(3) The court may also require the head of department of the officer to certify whether or not such disclosure would be detrimental to the public interest.

(4) These two conditions had not been considered and the magistrate was ordered to record further evidence in order to comply with s 124 of the Evidence Act 1950 before making any ruling for non-disclosure.

(5) The function of a magistrate in holding an inquiry of death is to inquire, inter alia, whether any person is criminally concerned in the cause of death. The inquiry is to be held by examining witnesses on oath and the magistrate may admit any evidence which he thinks fit, especially hearsay evidence. His duty is to ascertain the cause of death and he is not bound to follow usual procedure.

(6) The magistrate was therefore correct in ruling that the written information be examined by her.

Case referred to
1 *PP* v *Kulasingam* [1974] 2 MLJ 26 (folld)

Legislation referred to
Criminal Procedure Code (FMS Cap 6) ss 328, 337
Evidence Act 1950 ss 124, 162

Mohd Zabidin bin Mohd Diah (Deputy Public Prosecutor) for the Public Prosecutor.

Ghazi bin Ishak (*Koh Boon Chye* with him) for *Tan Sri Loh Boon Siew*.

P Vijendran (*CP Mahendran* with him) for the widow.

Ranjit Rai Sharma for *Jefri Yap*.

Cur Adv Vult

Mohamed Dzaiddin J: In the exercise of my revisionary powers under s 341A of the Criminal Procedure Code (FMS Cap 6) ('CPC'), I called for the record of the magistrate's inquest after being notified in writing by the deputy public prosecutor and Encik Ghazi Ishak, one of the counsel holding watching brief, that they were dissatisfied with the ruling made by the magistrate on 27 September 1989 in an inquest to determine the cause of death of Loh Kah Kheng ('the deceased), the son of a well-known philanthropist, Tan Sri Loh Boon Siew.

The facts

The record of the proceedings of the magistrate's inquest showed that on 14 September 1989, DSP Eric Foong, the Deputy OCCI Penang, testified that he assisted in the police investigation into the death of the deceased. To a question by Encik Vijendran, he said he could not disclose whether there was any information of murder although an investigation of murder was still continuing. Counsel then applied to the magistrate to stop the inquest in view of DSP Foong's evidence because police investigation of the case has not been closed. The magistrate then adjourned the inquiry to 27 September 1989 to enable the parties to make their submissions on this issue.

However, when the inquiry resumed on 27 September, DSP Ismail, the officer assisting in the inquiry, applied to recall DSP Eric Foong to clarify about the murder investigation. DSP Foong testified that in the course of his investigation, he received certain information from a police informer concerning the deceased's death, which related to a commission of a crime. The information was given in official confidence and recorded in writing by his former superior officer, ACP Raja Lope Ahmad and only both of them had access to the said information. At this juncture, both Encik Vijendran and Encik Ghazi applied for the information to be divulged as they felt that it would assist the magistrate in determining the cause of death. DSP Ismail, on the other hand, objected to its disclosure on the ground of privilege under ss 124 and 125 of the Evidence Act 1950. The learned magistrate ruled that the said written information could not be disclosed at the inquest, but held that it should be shown to her for her own consumption.

Submission

At the hearing of this revision on 13 October, I entertained further submissions of the DPP and counsel after studying the grounds of the magistrate's ruling. Encik Zabidin submitted that the magistrate was correct to pro-

hibit public disclosure of the said information on the ground of privilege. However, he contended that she was wrong in her second ruling ordering the information report to be shown to her. The learned DPP felt that it might prejudice and influence her verdict. At any rate, he was of the view that the information by itself was hearsay and inadmissible.

Both Encik Ghazi and Encik Vijendran urged me to overrule the magistrate's decision by ordering a full disclosure of the said information in the interest of justice. Encik Ghazi submitted that the magistrate was wrong in her rulings without first satisfying herself that the information came under s 124 of the Evidence Act 1950 and if so, whether the proviso to the said section had been satisfied. She had also prematurely made the ruling without inspecting the information in compliance with s 162 of the Evidence Act 1950 to determine its admissibility. Encik Vijendran contended that on the basis of DSP Foong's evidence, the issue of confidentiality under s 124 was already lost and unless the document was disclosed fully, it would have a prejudicial effect on the verdict.

Conclusion

The object of a revision is to satisfy the judge as to the correctness, legality, or propriety of any finding, sentence or order recorded or passed. 'In a revision, the main question to be considered is whether any order made by the lower court should be interfered with in the interest of justice.' (*PP* v *Kulasingam.*[1]) Therefore, with these principles in mind, I shall now proceed to examine the magistrate's rulings.

First, on the magistrate's ruling that the written information in the custody of DSP Eric Foong be not disclosed, I am of the opinion that although she was right in her decision, she had however acted prematurely in arriving at the decision because she failed completely to consider the provisions of ss 124 and 162 of the Evidence Act 1950. Section 124 provides as follows:

> No public officer shall be compelled to disclose communications made to him in official confidence when he considers that the public interest would suffer by the disclosure:
>
> Provided that the court may require the head of the department of the officer to certify in writing whether or not such disclosure would be detrimental to the public interest and, if the head of the department certifies that such disclosure would not be prejudicial to the public interest, then the officer shall disclose the communications.

The commentary in *Sarkar's Law of Evidence* (13th Ed), p 1230 says that the occasion for claiming privilege under s 124 arises only when the evidence sought to be given is a communication made to a public officer 'in official confidence'. That is the condition precedent before privilege can be claimed. Therefore, the important question to be decided first by the learned magistrate is whether or not the communication was made to DSP Foong 'in official confidence'. The court is the sole judge of this question. This she can decide not only by inspecting the document, but can also take 'other evidence' to determine on its admissibility (s 162(2)). If she determines that the communication was not made 'in official confidence', the occasion for claiming privilege is then non-existent. Further, the proviso to our s 124 states that the court may require the head of the department of the officer to certify in writing whether or not such disclosure would be detrimental to public interest. If the court holds that the communication was made in official confidence, it rests exclusively with the head of the police department to withhold or allow disclosure depending on whether or not it would be prejudicial to the public interest. From her grounds of decision, the learned magistrate had clearly failed to consider and apply the two conditions precedent in arriving at her ruling.

In the result, I am compelled to overrule her first ruling and direct her to record further evidence in order to comply with s 124 of the Evidence Act 1950 before making any ruling for the non-disclosure of the written information.

On the second count, in the light of the primary function of a magistrate in an inquest to inquire into the cause of death, in my judgment, she was correct in her ruling that the written information be examined by her for her own consumption. It is clear from her grounds of decision that the second ruling was made to enable her to form an opinion as to the cause of death. It must be remembered that the function of a magistrate holding an inquiry under Chapter XXXII of the CPC is to inquire, when, where, how and after what manner the deceased came by his death and also whether any person is criminally concerned in the cause of such death (s 337). The 'cause of death' is defined under s 328 to include not only the apparent cause of death as ascertainable by inspection or post-mortem examination of the body of the deceased, but also all matters necessary to enable an opinion to be formed as to the manner in which the deceased came by his death and as to whether his death resulted in any way from, or was accelerated by any unlawful act or omission on the part of any other person. Hence, the magistrate holds an inquiry by examining witnesses on oath and 'while usually following the ordinary rules of evidence, he may admit any evidence which he thinks fit, especially hearsay evidence. His duty is to ascertain the cause of death and he is not bound to follow the usual procedure of law courts.' (*Mallal's Criminal Procedure* (4th Ed) p 485.) In the present proceedings, there is before the learned magistrate evidence in the nature of an information which

could perhaps shed some light as to the cause of death of the deceased. I am, therefore, of the opinion that so long as the learned magistrate was satisfied that there was evidence, in whatever form or manner elicited and whether admissible or not, which could assist her in establishing the cause of death of the deceased, she was perfectly entitled to know and take cognizance of it.

I am grateful to the DPP and counsel for assisting me in this revision.

Order accordingly.

Solicitors: *Presgrave & Matthews; RR Chelliah Brothers; Sharma & Jaafar.*

Reported by *Mathavan Devadas*